No. 406

In the
Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., APPELLANTS

v.

EMMA SHANNON AND RICHARD J. SHANNON, D/B/A E. AND R. SHANNON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS—SAN ANTONIO DIVISION

MOTION TO DISMISS APPEAL OR TO AFFIRM

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Appellees, hereinafter referred to as appellee, move the Court to dismiss the appeal herein on the grounds hereinafter set forth, or to affirm the judgment sought to be reviewed on the appeal on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

Hereinafter appellee will refer to the United States of America and Interstate Commerce Commission as appellant and to the various interveners as appellant interveners.

Inasmuch as the opinion of the District Court as well as the judgment thereof, the opinion of the Interstate Commerce Commission, as well as the order thereon and on the petition for reconsideration, and various

statutes are appended to appellant's jurisdictional statement under appendices I, II, and III, respectively, (APPENDIX I, pages 1a to 6a; APPENDIX II, pages 7a to 34a; Appendix III, pages 35a to 37a, all of appellant's jurisdictional statement), appellee will refer to same as such and the first appendix printed in this motion will be numbered APPENDIX IV and commence with page 1b.

STATEMENT OF THE CASE

Appellee submits that certain important factors concerning appellee's operation in the sugar business are omitted by appellant and appellant interveners in their statement of the material facts involved in this case and for that matter was omitted in the opinion of the Interstate Commerce Commission, the original of which is appended to appellant's Jurisdictional Statement (Appendix II). These pertinent facts are found in the statement of facts prepared from the oral testimony taken before the examiner in this matter and were, of course, considered by the District Court of three judges in making the judgment and opinion in favor of appellee.

Appellee, of course, believes that an understanding of the complete fact situation is necessary for a proper determination of whether or not the question involved in this case is substantial. All parties in the District Court were required to file briefs in an attempt to substantiate their position. In the original brief of appellee a statement of facts is contained referring specifically to the testimony transcribed by the court reporter in the hearing before the examiner. This statement of facts contained in appellee's brief is found in Appendix IV (pp. 1b-7b). Neither appellant nor appellant interveners in their briefs before the District Court made any contention that appellee had

misquoted any of the testimony in said statement of facts.

Said facts show that the original hearing in this matter were made and developed as a result of a routine investigation and that about two years prior to the original hearing in this matter appellee had received a communication from the Interstate Commerce Commission concerning his sugar business but no action was at that time taken against him. (App. IV, pp. 1b) Appellee is in the business of buying and selling livestock, in the feed mill business, and also sells corn, oats, wheat, bran, molasses, sugar, salt, fertilizers and everything in the feed line. Appellee has been in business since about 1934 and began handling grains, fertilizers, molasses and similar items about six years prior to the 1957 hearing before the examiner in this matter and sugar a little over three years prior to said hearing. (App. I, pp. 3a; App. IV, pp. 1b) Appellee had seven trucks valued at $14,176.50 as of December 31, 1956, and of those, only three of them were used for long hauling which includes the hauling of sugar and many other items. That the total amount of fixed assets of the company, including mill equipment, office furniture, automobiles, etc. is $59.350.26 as of December 31, 1956, and all of said asset accounts remained fairly constant during the year 1956 and up until the date of hearing. (App. I, pp. 3a; App. IV, pp. 1b-2b) That in addition to the fixed asset accounts there were $56,459.91 in current assets of which $30,000.00 was in accounts receivable, leaving $26,000.00 other assets, including approximately $4,700.00 in cash, so that the three trucks being used to haul sugar represented in the total of seven trucks, the seven trucks being valued at $14,176.50, was a small percentage of the total assets

of the company; and further such trucks used for hauling sugar also hauled many other items. (App. I, pp. 3a; App. IV pp. 2b) The salaries paid truck drivers used on the large trucks averaged $240.00 per week out of a total payroll of $1100.00 per week and the three truck drivers on the three large trucks were not paid exclusively for hauling sugar but hauled many other items. (App. I, pp. 3a; App. IV 2b)

Appellee purchases sugar taking title in his own name and any losses on same after purchase is borne by appellee. (App. I, pp. 3a; App. IV pp. 2b-3b) It is not appellee's practice to take orders for sugar and then obtain same. (App. I, pp. 3a-4a; App. II, pp. 15a; App. IV pp. 3b) Appellee attempts to sell the sugar as rapidly as possible because the market for sugar breaks rapidly, the margin of profit is comparatively small, and the commodity deteriorates quickly. (App. IV, pp. 3b-4b) The margin of profit in the sugar business for a sugar dealer in San Antonio, Texas, on the date of the hearing in March, 1957, was 25¢ to 35¢ per hundred pounds. (App. IV, pp. 3b-4b) Appellee could and had sent an empty truck from San Antonio to the place of purchase of the sugar at Supreme, Louisiana, to transport sugar back to San Antonio at a profit. (App. IV, pp. 4b). Appellee stated that he could not make a profit on such transportation at the prices sugar was selling for in San Antonio at the time of the hearing since beet sugar from Colorado, California, and Canada was, at such time, keeping the sales price of sugar down in San Antonio. (App. IV, pp. 4b).

The cost of unloading sugar and storing it is comparatively high and eats into or causes to vanish any profit that those in the sugar business might make, and the price fluctuation in the sugar business are

also quite drastic, which necessitates the moving of the item quickly to avoid possible loss. That although this would be true in any mercantile business some items are more perishable than others. (App. IV, pp. 4b) On occasion appellee will send an empty truck to Louisiana to load sugar, but as a matter of common sense it would be more profitable for him to be delivering some commodity that he was selling to Louisiana at the same time. (App. IV, pp. 5b) However, a considerable amount of sugar remains in the warehouse of appellee in San Antonio (over 50,000 pounds at the last inventory taken prior to the hearing, less that portion thereof which may have been in transit but still properly included in the inventory. (App. I, pp. 3a; App. IV, pp. 5b) From this stored sugar frequent sales in less than carload lots are made. (App. IV, pp. 5b) Appellee has on occasion stored sugar in commercial warehouses when his warehouse facilities were inadequate, but such additional expense, of course, is avoided when appellee's warehouse facilities can handle the storage. (App. IV, pp. 5b)

There was no evidence to show that there were any identifiable transportation charges made by appellee to the purchasers of the sugar, nor has appellee any basis or formula for assessing transportation charges, nor does appellee hold himself out to the general public to haul sugar for any compensation. (App. I, pp. 3a; App. IV, pp. 6b)

That prior to appellee's buying and selling of sugar he purchased and still does purchase salt and grain in the same manner as he now purchases and sells sugar; however, the Interstate Commerce Commission never questioned the transportation of any of the items handled in the identical manner as sugar. (App. II, pp. 14a and 21a; App. IV, pp. 6b)

Appellee sells almost all of his sugar to purchasers on credit and have been selling on credit since the inception of his sugar business. On the date of the hearing appellee had more than $10,000.00 tied up in accounts receivable from purchasers of sugar and at times during 1956 (the year immediately prior to the hearing) had as much as $20,000.00 to $30,000.00 tied up in accounts receivable from sugar purchasers. (App. I, pp. 3a; App. IV, pp. 6b) Of course, what is considered a large inventory varies depending on the business and a large inventory in the sugar business would be considerably less than would an inventory of more stable products, where the market does not fluctuate, nor the item deteriorate as rapidly. (App. IV, pp. 6b-7b)

THE QUESTION IS UNSUBSTANTIAL

After the evidence had all been introduced before the examiner in this matter said examiner found that appellee was engaged in the business of buying and selling livestock, livestock feed stuffs, molasses, grain, salt and sugar, and that the transportation in their own trucks of the sugar to which they hold title is in furtherance of their primary non-carrier commercial enterprise; and that under the "primary business" doctrine that such transportation constituted private carriage and recommended that the investigation be discontinued. (App. II, pp. 9a - 10a)

The investigation was ordered November 5, 1956, (App. II, pp. 9a), the hearing held in March, 1957, (App. IV, pp. 1b) and the Examiner's report and recommended findings were served on August 29, 1957. Approximately two years later, on August 3, 1959, the Interstate Commerce Commission made its order and opinion refusing to accept the recommended

order of the examiner. (App. II, pp. 7a). The Interstate Commerce Commission in said opinion found that the statement of facts in the examiner's report was adequate in all material respects and, as modified in said opinion, said Interstate Commerce Commission adopted said examiner's report as their own. (App. II, pp. 11a)

It was during the interim period between the time that the examiner's recommended report was filed in August of 1957, and the time that the opinion of the Interstate Commerce Commission was written in August of 1959, that the Transportation Act of 1958, 72 Stat. 574, Section 203 (c) was amended. (App. III, pp. 36a)

Appellee will discuss what, in his opinion, is the effect of such amendment in a later portion of this motion. Suffice it to say at this point that appellee believes that the Interstate Commerce Commission requested legislation from the Congress to attempt to bring a fact situation, such as the present case, into prohibited carriage; but, instead, all that the Congress did was to write the "primary business" test already existent in the case law into statutory law, so that, in effect, there was no actual change made in the effect of the law upon appellee because of the passage of such statute. It is further evident that the "primary business" test remained the same as it had been previously decided by the courts, so that, of course, this case does not involve a substantial question.

Appellee mentions the examiner's report at this stage, however, for another reason. Whenever there is an examiner involved, who has heard all the witnesses, and finds in favor of a governmental agency and later the substantial evidence rule comes into play,

regardless of the state of the record, there is always the specter lurking behind the whole case that the examiner did not believe the testimony of all of the individual witnesses and that, therefore, the individual had no evidence to substantiate his contentions. This would mean that through presumption, taken together with the substantial evidence rule, the governmental agency would have sustained its burden before the courts. In the case at bar, however, the above is completely inapplicable because the examiner ruled straight down the line in favor of appellee and said examiner, after having heard all of appellee's witnesses in person, was satisfied that the evidence given by said witnesses was true, and from the facts the case against appellee should be dismissed. In fact, the cases go further in upholding the validity of the examiner's report and do not limit the worth of same merely to prevent it from being said that all of the material evidence elicited from the individual witnesses was not believed. Instead the cases give the examiner's report some affirmative worth in a case such as the case at bar, and that it requires a more severe study of the record in order to uphold the governmental agency's order under the substantial evidence rule. In this connection please see *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474.

As to the amendment of Section 203 (c) of the Interstate Commerce Act, 49 U.S.C. Section 303 (c) (App. III, pp. 36a), as above stated, such amendment merely brought the "primary business" test into the statutes, even though same had been applied in the case law for a number of years. A leading case in this field is, of course, *Brooks Transportation Co., Inc. et. al.* vs. *United States, et. al.*, (U.S.D.C.E.D. Va., 1950), 93 F. Supp. 517, affirmed, 340 U. S. 925. In that case the

Court held that if it is established that the primary business of a concern is the manufacture or sale of goods which the concern transports itself in the furtherance of its primary business, and the transportation is merely incidental thereto, the carriage of such goods from the factory or other place of business to the customer is private carriage even though a charge for transportation is included in the selling price or added as a separate item. Although the delivery of the items in the *Brooks* case were somewhat different from the case at bar, in that the company's trucks in the *Brooks* case delivered the items from the place of business to the customers; still the case is similar to the case at bar, since when the trucks returned to the factory, they brought back materials needed at the factory. It should be pointed out that in the *Brooks* case, there was a definite transportation charge made, which charge has never been made by appellee, and still the *Brooks* case held the carriage to be private.

In the application of the *Brooks* case to the case at bar appellant seems to ignore the fact that appellee is in a general mercantile business and that all of the items sold by appellee, with the exception of sugar, have been expressly approved by appellant as part of the business of appellee — this being so, even though prior to his being engaged in the sugar business, and thereafter, appellee has brought back other items in their trucks in their business in the Louisiana area in the identical manner as is now done in the sugar phase of their operation, which has been held to be permissable and legal. From scrutinizing the record in this case as a whole, and the operation of appellee as a whole, appellee is engaged in a general mercantile business dealing with various types of items, including sugar. Applying the "primary business" test in this

matter, it is obvious that the transportation of sugar from Supreme, Louisiana, to San Antonio, Texas, by appellee is certainly in furtherance of a "primary business" enterprise which is the general mercantile business of appellee. From the evidence it is also clear that a more restrictive interpretation of the "primary business" test would also require a holding that appellee is engaged in the sugar business. This is pointed out by the fact that appellee purchases sugar in his own name, has no pre-existing orders for same, has only a reasonably small percentage of his assets tied up in transportation facilities, and only part of its transportation facilities are used for the transportation of sugar. Further that appellee is selling the sugar at the going market price in San Antonio and obtaining the going market profit therefor, is maintaining a reasonable inventory of sugar on hand, is responsible for any loss or damage to the sugar, and is selling sugar on credit and has substantial accounts receivable tied up in sugar. The *Brooks* case discusses various reasons why a concern might want to deliver in its own trucks rather than use a common carrier, such as the absence of congestion at loading docks, the safe arrival of goods not mixed with those belonging to others, the control over the time of delivery, etc.

Appellee submits that the various factors found by the District Court in the case at bar are most important in considering the "primary business" doctrine. Certainly it cannot be said that the District Court ignored said doctrine in its decision in this case. That this is so can clearly be shown from the fact that this case was decided not long after the case cited by appellant in its jurisdictional statement, same being in *Church Point Wholesale Beverage Co.* v. *United States*, 200 F. Supp. 508 (W.D. La.). There the court, after

discussing the "primary business" test of Section 203 (c) as it concerned the fact situation in that case, found that under said test the plaintiffs in that case were engaged in prohibited transportation without a proper permit. It should be noted, however, that in that case most of the goods purchased were purchased with pre-existing orders, no inventories were kept, and that the marketing area was hundreds of miles beyond the plaintiffs selling of their other products. Of course, none of these factors are involved in the case at bar. Most important is the fact, however, that Judge John R. Brown from the United States Court of Appeals, Fifth Circuit was one of the three judges in both the *Church Point Wholesale Beverage Co.* case and the case at bar.

Evidently Judge Brown felt that there was a difference in the fact situations in the two cases as evidenced by the holdings of the courts in the respective cases. Certainly each case must be decided upon its own set of facts, and merely because appellee admits that he has gone into the sugar business to make a profit should not change his private carriage into something else. His admission is but a statement of common sense, and if he could not make a profit buying and selling sugar, it would be foolish for him to continue to do so, nor should the "primary business" test require that he lose money on a particular item in order for same to come under the doctrine.

All of the above is material upon the matter of whether or not the question involved in this case is substantial because this case was decided by the District Court based on a fact situation considerably different from those cases holding that there was no private carriage involved under the "primary business" test. As already pointed out the case is different

from the facts in the *Church Point Wholesale Beverage Co.* The case is also different from the case of *Interstate Commerce Commission* v. *Stickle*, (Ct. of Appeals, 10th Circuit, 1942) 128 F. 2d 155, which is the case that appellant first cited to appellee after their investigation of appellee was completed, as authority for appellant's decision to require a hearing.

Nor should any cases that were decided prior to the time that Section 203 (c) of the Act was amended (1958) be held to be immaterial to the case at bar, insofar as the question of being substantial is concerned, since it is now necessary for the first time to consider the meaning of said amendment. Actually, it is very clear that said amendment did nothing but make the statutory language of the Interstate Commerce Act conform to the language of the previously existing case law concerning this matter.

Appellee has always taken the position that the adoption of said amendment codified the existing law on the subject. Appellant arrives at the same conclusion in their opinion in the case at bar when they say in App. II, pp. 17a:

> "Subsequent to the taking of evidence in the instant proceedings, section 203 (c) of the act was amended (in August 1958) to read:
>
> > 'Except as provided in section 202 (c) section 203 (b), in the exception in section 203 (a) (14), and in the second proviso in section 206 (a) (1), no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such trans-

portation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person.'

"Amendment of this section had the effect, among other things, of writing into the act our usual or 'primary business' test by which we determine whether questioned transportation activities of those also engaged in business enterprises other than transportation are within the scope of lawful private carriage or of motor-carrier operations for compensation for which authority from this Commission is required. From the portion of the legislative committee reports relating to the amendment of section 203(c) set forth in appendixes A and B hereto it is clear that insofar as the test expressed in the *Lenoir* case is concerned, the amended section is not intended to change, but to codify, the law with respect to the test for the determining of what transportation activities are permitted within the scope of lawful private carriage. It is our view that the principal question here, whether considered prior to or subsequent to the amendment of section 203(c), inasmuch as neither Fraering nor the Shannons are engaged in transportation as a primary business, is whether the sugar transportation operations of Fraering or of the Shannons are in bona fide furtherance of the primary business of the respective respondents, on the one hand, or, on the other, are conducted as related or secondary enterprises with the purpose of profiting from the sugar transportation performed."

The only quarrel that appellee might have with the above statement concerning the codification of the "primary business" test is that said amendment wrote into the statute the "primary business" test as applied

by the courts as opposed to the test as applied by the Interstate Commerce Commission. Be that as it may, it appears that even though appellant states that the amendment merely codified the existing law, that in their written opinion in the case at bar, they stretch said "primary business" test all out of proportion and implied that the amendment has changed the law and placed a more severe burden on an individual to show that transportation is private carriage. Reference is made to Appendix B of the opinion and order of the Interstate Commerce Commission in the case at bar, same being a portion of House Report No. 1922 of the Committee on Interstate and Foreign Commerce (App. II, pp. 29a) which says as follows:

> "Sometimes the purchase and sale is a bona fide merchandising venture. In other instances, pre-arranged plans are set up in order that the real consignee may receive transportation at a reduced cost."

It is obvious that the Committee by its recommended amendment of the Act was intending to prevent subterfuge in this field and the prevention of pre-arranged plans to stop the real consignee from receiving transportation at a reduced cost. It is further obvious that the Committee did not intend to recommend the passage of an amendment which would change a bona fide merchandising venture such as in the case at bar into something other than private carriage.

The portion of the Senate Report No. 1647 of the Committee on Interstate and Foreign Commerce found in Appendix A of the opinion and order of the Interstate Commerce Commission in the case at bar (App. II, pp. 28a) makes it clear that it was not the intent of such Committee in their recommendation to Congress

to change the "primary business" test set out in the *Brooks* case supra. There the Committee stated:

> "Indeed the 'primary business test' contained in Brooks Transportation Co. v. U. S. (340 U. S. 925 (1951)), so sacrosanct to the private carriers and deemed by them essential to their best interests and the preservation of their rights, would be written directly into the statute."

It is also stated in the House Report, above referred to, that there was no intention on the part of the Committee in any way to jeopardize or interfere with bona fide private carriage as recognized in the *Brooks* case. There the Committee states:

> "There is no intention on the part of this committee in any way to jeopardize or interfere with bona fide private carriage, as recognized in the Brooks case."

(App. II, pp. 31a)

It is thus clear that the amendment of the Interstate Commerce Act contained in section 203(c) has not changed the previously existing law, nor is there a substantial question involved in the interpretation of said pre-existing law as it applies to the fact situation in the case at bar. As shown in the House Report above referred to (App. II, pp. 29a - 30a) it was suggested to said Committee that the definition of "private carrier" be changed, such suggestion having been made by the Interstate Commerce Commission. It was proposed that there should be a proviso added to the definition of "private carrier" that any person who purchases, transports and sells property for the purpose of fostering a highway transportation business is engaged in a public transportation service. The Committee refused to go along with the amended definition and stated that it had no intention of unsettling the "primary busi-

ness" test, which would then require another long series of litigation, which finally culminated in the *Brooks* decision.

It is obvious that the Committee's recommended amendment of the Act also intended to prevent subterfuge in this field and the prevention of pre-arranged plans to stop the real consignee from receiving transportation at a reduced cost. It is further obvious that neither the Congressional amendment, nor the Committee's report recommending its passage, intended to change a bona fide merchandising venture such as in the case at bar into something other than private carriage. In the case at bar, there is no evidence whatsoever to show any "pre-arranged plans", set up in order that the real consignee may receive transportation at a reduced cost. The Congress certainly made its intent clear when it refused to change the definition of "private carrier", but, instead, reiterated the fact that it wanted to codify the "primary business" test in the *Brooks* case when it passed the legislation it did.

Reference is further made to the Senate Report (App. II, pp. 27a) where the Committee says:

> "What is needed, in the opinion of the subcommittee, is a further prohibition to the effect that no person in any commercial enterprise other than a duly authorized or specifically exempt for-hire transportation business shall transport property by motor vehicle in interstate or foreign commerce unless such transportation is solely within the scope and in furtherance of a primary business enterprise (other than transportation) of such person."

By reading the actual amendment it is obvious that the word "solely" was omitted so that the Congress did not follow the subcommittee's recommendation and

limit the "primary business" test by the use of the word "solely". This would certainly show that the Congress intended there to be some leeway in the determination of "primary business". It is also worth noting that in the amendment "a" primary business enterprise is used instead of "the" primary business enterprise, which again seems to imply that there should be more leeway given in the determination of what is a "primary business" enterprise and that an individual could have more than one "primary business" enterprise.

It is obvious from studying the record as a whole in this case that appellee makes the reasonable profit of a sugar merchant in the locality where appellee operates. Certainly appellee does not raise sugar, so the costs of hauling sugar is an important factor to determine his margin of profit, since appellee buys and sells sugar; but storage costs, bookkeeping costs, bad debts, inventory losses, loading costs, etc. are also important factors, and just because hauling is an element of cost does not, by any stretch of the imagniation, mean that appellee is in the trucking business for hire.

Regardless of what one calls it, whether or not appellee is in the trucking business would invariably boil down to the question of — are his operations really a subterfuge? And there is absolutely no evidence in the record to show that any of appellee's sugar operations are anything but legitimate and bona fide. How else could appellee be in the business of buying and selling sugar when appellee does not raise it? Appellee buys the sugar from the manufacturer, hauls it to his own business, taking title in his own name, and bearing the loss connected therewith; sells the sugar on credit with the attendant possibility of bad debt losses and, in the interim period, stores the sugar. What more

could appellee do to be considered a legitimate sugar merchant? Is it necessary for him to haul by rail and pay such costs when he has his own trucks available for hauling and has had them available over the years for his complete operation, starting with livestock, and expanding over the years to feed stuffs, grain, corn, molasses, salt and sugar. Is it necessary for appellee to send an empty truck to Louisiana to bring back his sugar and to send his livestock to Louisiana and bring the truck back empty in order for him to be considered a bona fide sugar merchant?

Nor is the fact that the average profit of appellee at the time of the hearing on the sale of sugar was about 35¢ per hundred weight when the transportation charges by common carrier were higher than that figure at that time controlling on the question of whether or not appellee was a private carrier. There is no evidence in the record in the case at bar to show that appellee was under-selling anyone else in their sales of sugar in San Antonio, Texas. In fact the evidence shows that he was merely selling his sugar in San Antonio, Texas, at the going market price in said city. There is also no evidence in the record that appellee was paying anything other than the wholesale price at Supreme, Louisiana, for his purchase of sugar. It would thus appear that, based upon the market price in San Antonio, at the time of the hearing, no one could afford to use a common carrier to haul sugar to San Antonio and make a profit. Of course, to go into this question and the question of how the sugar business is controlled in the San Antonio, Texas, area would require much speculation and assumption and improperly go outside the record in this case. There is also no evidence in the record as to how other sugar merchants in the San Antonio area transport their sugar to San

Antonio, whether by their own trucks, or by using a common carrier, and appellee will not speculate as to that either. There is evidence in the record, however, as above pointed out, that at the time of the hearing, beet sugar from other localities was depressing the market in the San Antonio area and that could possibly explain the profit per hundred weight at the time of the hearing. The point is, however, that the mere fact that the profit for sugar was less at the time of the hearing than the freight rate would not, of itself, or taken together with all other evidence in the case, under the substantial evidence rule, be sufficient to uphold the decision of the Interstate Commerce Commission in this case. There are many factors going into the cost of a product, including costs of transportation, handling, loading, unloading, bookkeeping, administrative salaries, warehousing, etc. Appellee believes that from all the evidence, it is clear that appellee possesses all the incidents of a bona fide sugar merchant and that his transportation of sugar to his warehouse and office in San Antonio is in furtherance of his primary mercantile business.

Appellee does not quarrel with the fact that the Interstate Commerce Commission has done an excellent job in the transportation field. Sometimes, however, such an agency with the best of intentions, may attempt to regulate certain individuals in a manner that they believe is for the public good, but as a result some innocent person or concern is caught in the shuffle and a legitimate and bona fide business is consequently interferred with. Appellee submits that in such a situation it is for the courts to scrutinize the situation and protect the injured party, which is exactly what the District Court did in the case at bar.

In addition to the main argument contained above as to fact that this question is not substantial, there are also certain technical arguments available to appellee which reach the same conclusion. In the first place the definitions of "common carrier" and "contract carrier" of the Interstate Commerce Act are mutually exclusive. Section 203 (a) (14) and (15) of the Interstate Commerce Act, 49 U.S.C. Section 303 (a) (14) and (15). (App. III, pp. 35a). Section 206 (a) of the Interstate Commerce Act, 49 U.S.C. Section 306 (a) prohibits the common carrier from operating without a proper certificate and Section 209 (a) of the Interstate Commerce Act, 49 U.S.C. Section 309 (a), prohibits a contract carrier from operating without a proper permit. (App. III, pp. 36a and 37a). In its opinion and order in the case at bar the Interstate Commerce Commission merely concluded that there had been a violation of one or the other of these sections but failed to reach a conclusion as to which of said sections were violated. (App. II, pp. 23a)

This equivocal conclusion deprives the order of the definiteness guaranteed by the standards of due process prescribed for administrative orders by numerous decisions of the court and the standards prescribed in Section 8 (b) of the Administrative Procedure Act, 60 Stat. 242 (5 U.S.C. Section 1007) in the following words:

> "All decisions . . . shall include a statement of (1) findings and conclusions, as well as the reason or basis therefor, upon all material issues of fact, law or discretion presented on the record; . . . ".

The standards of definiteness which must be met by an administrative order were clearly announced in the case of *National Labor Relations Board* v. *Express Publishing Company*, 312 U. S. 426 (1941). Since

the violation of an order of the Interstate Commerce Commission is a crime under Section 222 (a) of the Interstate Commerce Act, it would appear that an equivocal finding such as made in the case at bar is insufficient. Under said equivocal conclusion appellee would have to defend himself against a conclusion that he has committed either one or the other of two mutually exclusive violations. If there were ever a contempt action brought under the cease and desist order as propounded by the Interstate Commerce Commission, the court would be required to perform the supposedly completed administrative function of deciding, for the first time, which, if either, of the two sections has been violated by appellee. Further appellee in order not to be in violation of said order, ought to be able to determine what changes should be made in the manner of conduct of his sugar business to avoid the necessity of applying for either a common carrier certificate or a contract carrier permit. If he is a contract carrier, appellee ought to be able to be one no longer by terminating the "continuing contracts with one person or a limited number of persons" that are essential to the conclusion that he is a contract carrier, and if appellee is a common carrier, he ought to be able to cease the holding of himself out to the public, which is essential to his being such common carrier. Also under the order, if appellee is to continue in his sugar business, he must either obtain a contract carrier permit or a common carrier certificate, but from the order cannot determine which.

Proceeding further, it appears that the inability or refusal of the Interstate Commerce Commission to decide which of Sections 206 (a) or 209 (a) appellee is supposed to have violated is symptomatic of its failure to make the essential basic findings of fact that are

necessary to support either a conclusion that appellee is a common carrier or that appellee is a contract carrier. Certainly it is necessary for the Interstate Commerce Commission to make a finding of basic or underlying facts to be stated in support of ultimate conclusions, rather than make a general conclusion such as in the case at bar. If appellee is a common carrier then there should be some basic finding to the effect that appellee holds himself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property of any class or classes thereof, for compensation. On the other hand, if appellee is a contract carrier then there should be some basic finding to the effect that appellee engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation . . . under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer. These are basic facts which should be found to exist before any person can be found to be a common carrier or a contract carrier, but these findings were not made by the Interstate Commerce Commission. Of course, these findings were not made because there was no evidence in the record upon which they could have been made.

One final technical matter involved in this case is that actually appellee has never been charged with a violation of Section 203 (c) of the Interstate Commerce Act, but, instead, has only been charged with the

violation of Section 206 (a) (1) or 209 (a) (1) of said Act. (App. II, pp. 9a)

CONCLUSION

Inasmuch as the questions upon which the decision of this cause depends are unsubstantial appellee respectfully requests that the Court dismiss this appeal or affirm the judgment sought to be reversed.

EMMA SHANNON AND RICHARD J. SHANNON D/B/A E. AND R. SHANNON, *Appellee*

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E. and R. Shannon are a partnership with the original E. Shannon (Edward Shannon) being dead, and Richard Shannon and Emma Shannon being partners in the business and d/b/a under the name of E. and R. Shannon, at the time of the hearing in this matter, with Emma Shannon (the mother of Richard Shannon and wife of Edward Shannon) having a 25% in the business at that time. (Statement of Facts — SF 73-74) The facts developed by Mr. Whitehead, the District Supervisor of the Interstate Commerce Commission at San Antonio were made and developed as a result of a routine investigation (SF-13). That about two years prior to the hearing Mr. Shannon received a communication from the Commission concerning the question of his sugar business and no action was taken against him at that time (SF-21). That Mr. Richard Shannon is in the business of buying and selling livestock, in the feed mill business, and also sells corn, oats, wheat, bran, molasses, sugar, fertilizers and everything in the feed line (SF-73), also salt (SF-16). That Shannon has been in business since about 1934 and began handling grains, fertilizers, molasses and similar items about 6 years prior to the 1957 hearing, and sugar a little over 3 years prior to the 1957 hearing (SF-73-74). That Mr. Shannon has 7 trucks valued at $14,176.50 (SF-45) as of December 31st, 1956 (SF-42-43). That of these 7 trucks (SF-60) only 3 of them are used for long hauling, which includes the hauling of sugar (SF 59-60). Also the trucks are not used for sugar but for hauling many other items. That the total amount of fixed assets of the company, including mill equipment, office furniture, automobiles, etc. is $59,350.26 as of December 31st, 1956 (SF 46-47; 42-43). That the asset accounts listed on the balance

sheet as of December 31st, 1956, remained fairly constant during the year 1956 and were constant up to the date of the hearing (SF 49). That in addition to the fixed asset accounts there were $56,459.91 in current assets of which $30,000.00 was in accounts receivable leaving $26,000.00 in actual assets including approximately $4,700.00 cash and the rest prepaid expenses, inventories, etc. (SF 48) so that the three trucks being used to haul sugar represented in a total of seven trucks, the seven trucks being valued at $14,176.50, was a small percentage of the total assets of the company, and further that such trucks used for hauling sugar were not used for same exclusively but on the contrary were also used to haul many other items. That the salaries paid the truck drivers used on the large trucks average about $240.00 per week (SF 50) out of the total payroll of $1,100.00 per week (SF-50) and, of course, as above stated, the three truck drivers on the three large trucks were not paid exclusively for hauling sugar but hauled many other items. That Mr. Shannon purchases sugar from J. Aron & Co., sugar refinery, Supreme, Louisiana, and that the sugar is billed to Mr. Shannon. This is admitted by Mr. Whitehead (SF 21-22): Also when Mr. Shannon sells sugar, such purchaser purchases the sugar from Mr. Shannon. This is pointed out because Mr. Whitehead used the word "consignee" to designate the person to whom Mr. Shannon sold the sugar and in Exhibit No. 1 introduced into evidence and to which respondents Shannon and Wilcox objected to the word "consignee" being used. However, Mr. Whitehead admitted that he used this word in error and that the sugar was always billed to Mr. Shannon and that the person Mr. Shannon sold sugar to should have been designated as the purchaser (SF 22). That Mr. Shannon purchases

sugar from Aron because he got started with them (SF 75) and has gone to Louisiana to attempt to get a reduction in price and actually contacted another concern to get a lower price, but that that concern did not have the needed grades of sugar so that Mr. Shannon has continued dealing with Aron (SF 75). That when something happens to the sugar after it is purchased from J. Aron & Co., the loss on same is borne wholly by Shannon (SF 75-76; SF 70-71). That Shannon does not take orders for sugar and then obtain the sugar from Louisiana (SF 79) and, in fact, on a number of instances, he has had some sugar already en route coming back and thought he had the sugar sold and it turned out that the prospective purchaser refused the sugar which meant that it would have to be stored and another purchaser attempted to be found (SF 79). This did not mean that he had the order before he purchased the sugar from Aron & Co., as Mr. Shannon himself stated (SF 79) but instead points to the fact that Shannon legitimately buys sugar from Aron & Co. and, if he cannot sell it, has to stand whatever loss there may be on the declining market or in case the sugar is damaged (SF 79) and, of course, as was pointed out by the attorney for the Bureau of Inquiry and Compliance that even though the prospective purchaser's refusal to purchase did not cost Mr. Shannon anything extra (SF 80); still, as a matter of common sense — in a business where the market breaks rapidly and the commodity deteriorates quickly, the loss of a sale can mean a considerable loss, since the cash representing the sales price is negotiable but many bags of sugar are not (SF 80). That the margin of profit in the sugar business is comparatively small and a reasonable profit for a sugar dealer in San Antonio on the date of the hearing, that is, March 1957,

is 25 to 35¢ per 100 lbs (SF 69). That Shannon could and had sent an empty truck from San Antonio to Supreme, Louisiana to transport sugar back at a profit. (SF 79-81). Shannon stated that he could not make a profit on such a transaction at the price sugar was then (at the time of the hearing) selling for in San Antonio (SF 82), since beet sugar from Colorado, California, and Canada was, at such time, keeping down the sales price of sugar in San Antonio (SF 76). Without waiving any objection plaintiffs have made to the introduction of Exhibit No. 1, plaintiffs would state that their profit as shown on such Exhibit of an average of approximately 85¢ per 100 pounds is merely the normal profit of a sugar dealer wherein the figures contained on Exhibits Nos. 2 and 3 designating the freight rates are entirely dissimilar. Mr. Whitehead did not dispute the above stated margin of profit because he testified that he did not know what the margin of profit would be (SF 23). That sugar is a perishable commodity (SF 70) and has to be turned over rapidly to realize any profit at all, because it will deteriorate (SF 70) and has a very short profit (SF 70); that the cost of unloading sugar and storing it is comparatively high and eats into or completely causes to vanish any profit that those in the sugar business might make (SF 17). That the price fluctuations in the sugar business are also quite drastic (SF 23 to 25) which again necessitates moving the item fast to avoid a possible loss. That it is necessary to sell sugar as quickly as possible to avoid this loss which, of course, is true in any mercantile business and yet, some items are more perishable than others (SF 24). Naturally, Mr. Shannon tries to sell his sugar as quickly as possible because of the above reasons but, as above set out, he does not obtain orders for sugar and then purchase

same but maintains a reasonably steady flow of sugar on his returning trucks from Louisiana. Also, as above stated, he may get the sugar sold as a truck is returning from Louisiana and then find that it is not sold. On occasion he will even send an empty truck over to Louisiana to load sugar (SF 16), but as a matter of common sense, it would be more profitable for him to be delivering some commodity that he was selling to Louisiana at the same time.

Be that as it may, when the sugar is returned to San Antonio, some of it might be sold while the truck is returning inasmuch as Shannon knows something about what his customers generally would want. However, a considerable amount of sugar remains in the warehouse (517 bags or over 50,000 lbs. at the last inventory taken prior to the hearing, less that portion thereof which may have been in transit but still properly included in inventory). (SF 35, 36, 37; 81). From this stored sugar frequent sales in less than carload lots are made (SF 77-78). Shannon has on occasion even stored sugar in commercial warehouses when his warehousing facilities, because of the amount of sugar and other items on hand at that time, were inadequate. However, because of the small margin of profit such a situation proved unprofitable (SF 36-37; SF 29-30). Also as to the sale included in Exhibit No. 1, to which respondents objected, because, among other reasons, same represented merely isolated sales of the parties, Mr. Whitehead admitted that the purchase and sale of sugar by Mr. Shannon was not limited to the individuals or companies listed on Exhibit No. 1, but simply that those persons did represent the principal purchasers from Mr. Shannon, but not that all of the purchasers purchasing sugar during the period covered in the exhibit were listed (SF 20). Although this point

might have no direct relevance to the case it is pointed out, so that a complete picture of the worth of Exhibit No. 1 may be brought to the attention of the Court.

That there is no evidence in the record showing that there are any identifiable transportation charges made by the plaintiffs to the purchasers of the sugar, nor have the plaintiffs any basis or formula for assessing transportation charges, but instead their sales are governed solely by the market price of sugar in San Antonio. There is no evidence in the record showing that the plaintiffs hold themselves out to the general public to haul sugar for any compensation.

That prior to plaintiffs' buying and selling of sugar, they purchased (and still do) salt and grain in the same manner as they now purchase and sell sugar (SF 83, 84); however the Interstate Commerce Commission never questioned the transportation of any of the items handled in the identical manner as sugar (opinion of Interstate Commerce Commission 81 MCC 341, herewith attached as part of transcript).

That Mr. Shannon sold almost all of the sugar to purchasers on credit (SF 37-38). These sales had been made on credit since the inception of Mr. Shannon's sugar business, that is, approximately three years prior to the hearing (SF 41). That at the date of the hearing in March 1957, Mr. Shannon had more than $10,000.00 tied up in accounts receivable from purchasers of sugar (SF 41). That at times during 1956 he has had as much as $20,000.00 and $30,000.00 tied up in accounts receivable from sugar purchasers (SF 42). That any sugar on a truck on the date of taking inventory was carried in the inventory showing clearly that the sugar belonged to plaintiffs and they considered it theirs (SF 54). Of course, what is con-

sidered a large inventory varies depending on the business and a large inventory in the sugar business would be a considerably less inventory than would an inventory of more stable products, where the market does not fluctuate nor the item deteriorate so rapidly.

Nowhere does Mr. Whitehead testify from his own knowledge but is merely quoting what Mr. Shannon and Mr. Wilcox said. The record as a whole should be inspected to determine what Shannon's true operations were and, as Mr. Whitehead said, Mr. Shannon very vehemently declares "that this is a legitimate business of his; that he is in the sugar business" (SF 16).